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No. 223

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

SAMUEL JOSEPH RUGENDORF,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

Reply Brief for the Petitioner

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In opposition to our petition for certiorari, the respondent has filed a brief which does not fairly meet the points presented by petitioner.

With the court's indulgence we will address ourselves briefly to both of the points made by respondent.

I.

THE IDENTITY OF THE INFORMANT

The respondent's arguments on the informer issue may appropriately be elevated, rather than reduced to absurdity.

First, the government addresses itself to the proven falsity of that portion of the agent's affidavit which said, "... Kelleher told McCormick that he saw Frank Schweihs at Rugendorf Brothers Meat Market, managed by Samuel Rugendorf ..." The government makes bold to suggest that this affidavit has not been proven false, notwithstanding the absolute certainty that petitioner *did not* manage the meat market. They solemnly assure Your Honors as follows: (Gov't. Br., p. 11), "A fair reading of this portion of the affidavit does not compel the conclusion that it was officer Kelleher who informed the F.B.I. that petitioner managed the market."

The disavowal by the government of all inferences which their affidavit does not "compel" is quite novel to these proceedings. At all earlier stages, the government has asked for and received the benefit of all the averments of the affidavit plus all fair intendments of the language thus used. In fact, in the paragraph preceding the quoted assertion, the government argues that the affidavit is to be construed in accordance with the understanding of, "reasonable and prudent men, not legal technicians."

The government, throughout its brief, flits from side to side of every issue with the agility of Stephen Leacock's horsemen, who somehow contrived to "dash madly in all directions." The foregoing is a fair example of the technique. Many others are available.

For example, the government argues, at pages 9 and 10 of its brief, that the right to seize stolen property does not depend upon the guilt or innocence of the person from whom they are seized. Thus, the government infers, the fact that the property is stolen justifies its seizure by any means available, and its fruits of the seizure then constitute lawful evidence against the party from whom they were seized. The true meaning of the government's

assertions is that the issue of legality of seizure is immaterial in any larceny case. But the government is not concerned with the consequences of its "logic". Rather, it is content to argue that the seizure was legal because the property was stolen, and that the defendant is guilty because the property was seized from him, while seeing no relationship whatever between these two assertions.

The government further discusses *Rovario* v. *United States*, 353 U.S. 53, and purports to find therein an inference that disclosure of the identity of an informer cannot be compelled when a warrant has issued (Gov't. Br., p. 10 footnote). Such an inference is thoroughly preposterous. *Rovario* makes no such distinction.

The government proceeds from the premise that *Rovario* applies only (respondent's language), "in the exceptional case where disclosure of an informant's identity is essential to the defense of the accused." (Gov't. Br. p. 8). The government extrapolates this wishful premise from Your Honors' statement that the privilege must give way if the information is *relevant* and *helpful* to the defense of the accused. Your Honors used the word "essential" in a wholly different context in describing an alternative situation. The government apparently feels free to indulge such misquotation on the premise that it could have no more reliable "informant" than this court. So long as one has a reliable informant, it is unnecessary to quote him accurately. (Gov't. Br. p. 11).

But the treatment of *Roviaro* is mild compared to the manner in which the respondent distinguishes *United States* v. *Pearce*, 7 Cir., 1960, 275 F. 2d 318. In *Pearce*, the agent solemnly swore, in his affidavit for a search warrant, that he was proceeding, "on the basis of confidential information, from a source which in the past has proved reliable. . ." 275 F.2d 321. In fact, this assertion was proven to be totally false. 275 F.2d 322. Therefore, the

government now argues *Pearce* is totally unlike the case at bar, because petitioner did not prove that the affidavit was a lie in that single particular.

It is quite fantastic that the government should feel at liberty thus to argue, after having successfully blocked the defendant's inquiries on this very issue. Apparently, the experience in *Pearce* has impressed upon the prosecutors in this district that the best way to support an agent's affidavit is to foreclose all inquiries as to its truthfulness. Had the trial court's rulings in *Pearce* been identical to its rulings in this case, the government would undoubtedly have assured Your Honors on certiorari that there was no evidence that the informant in *Pearce* was not, "a source which in the past has proved reliable", and that the affidavit must thus be presumed true.

It is just such cogent prosecutor's logic as this which has placed the petitioner where he now stands.

The government goes so very far as flatly to inform Your Honors that the informant did not play a part in the offense (Gov't. Br. p. 12). This piece of advice could only have come to Your Honors from government counsel; it is most assuredly not to be found in the record. In fact, the fair inferences from the circumstances of this case are most directly to the contrary. It is somewhat surprising that the government would have the temerity to make such a statement in this court in any case. But it is particularly noxious in this case. In the court below, the government successfully blocked every inquiry relating to the informant, including the place where he held his conversation with the F.B.I. agent.[1]

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[1] In its brief, the government apologizes for this ruling by stating that "the trial court may have been overly cautious" (Gov't. Br. 11). The motive for the prosecutor's objection, which the trial court thus sustained, is left to conjecture.

In this court, it now argues that the informant was an innocent party unrelated to the crime, presumably because the defendant was unable to prove the informant's guilt. If the denial to the petitioner of all information relating to informant's activities or identity contributed in any degree to this lack of evidence, that fact is not deemed impressive by the writer of the government's brief. The reasoning process thus evolved is more distinguished by its novelty than its basic logic. As applied to criminal prosecutions, *omnia pro spoliatoreum priesumuntur.*

In summation of the government's position: Disclosure of the informant's identity would not have helped the defendant because, "There is nothing to indicate that the informant participated in or had any relationship to the crime of which petitioner stands convicted." (Gov't. Br. p. 12). Therefore, the defendant was properly denied any opportunity to show that the informant participated in or had any relationship to the crime of which petitioner stands convicted. Moreover, the government had "the right to seize property reasonably believed to be stolen [independent of] the guilt or innocence of [the petitioner]" (Gov't. Br. p. 9), and therefore, since it did not matter whether petitioner was innocent or guilty, "it would be particularly inappropriate to disclose the name of the informant in this case." At any event, the informer's identity was immaterial because the government had a warrant; and it is none of the petitioner's business how the government obtained its warrant, because the warrant was unnecessary (Gov't. Br., p. 10, footnote). It would be a different thing if the defendant had proven that the "reliable informant" did not exist; (Gov't. Br. p. 10, footnote), but the petitioner did not prove this, and, therefore, was properly denied the right to find out whether the informant existed.

We doubt that such a presentation effectively answers the points made to Your Honors in this Petition.

II.

THE SUFFICIENCY OF THE EVIDENCE.

It is impossible to divorce the issue of evidentiary sufficiency, from that of the informant's identity. It is very patent that an examination of the informer would probably resolve all doubts that exist in this case.

We think that the government has unconsciously demonstrated to Your Honors the glaring weakness of the case in disclosing, as it did at p. 13 of its brief, the totality of the evidence on which it relies. We hope that Your Honors will consider each of the items thus placed in issue by the government. They are as follows: 1. "A personal fur piece was, at the time of the seizure, in the very same closet." It is uncontradicted evidence that this "personal fur piece" had not been seen by petitioner, or used by his wife, at any relevant time. 2. "Clothing used on the vacation had been taken from this closet." There is no evidence that the furs were there at that time, nor that petitioner took the clothes from the closet. The argument is almost absurd. But, if, as the government infers, the furs were in the closet before the defendant went on vacation, we would then have the ridiculous situation of a receiver of stolen goods placing the goods in his home, going on a vacation a thousand miles away, leaving keys to the home with a number of other persons, including disinterested neighbors. Such a contention is so utterly contrary to human experience as to require that the mere statement of the proposition suffices to condemn it. 3. "The furnished basement area adjacent to the closet was in general use by the occupants." This proposition stretches the

evidence beyond the permissive bounds of elasticity. The "occupants" referred to by the government, do not include the petitioner. But in any event, it is hard to see how one can be charged with notice of what is on the other side of a door.

The government also makes reference to "testimonial conflicts", the relevance of which is conjectural at best. As we observe in our original brief, the day when Leo returned the key has little materiality in view of the ease with which such a key can be copied. And the location of the bags in which the agents placed the furs has not the slightest claim to relevance, so far as we can see.

What the government has really done is to point up the ultimate absurdity of the case: that the evidence tends much more strongly to incriminate petitioner's wife, than petitioner, without incriminating petitioner's wife in the slightest degree is obvious.

CONCLUSION.

So utterly outlandish is the failure of justice in this case, and so thoroughly wanting in reason are the government's arguments, that it is hard to realize that we stand before the ultimate judicial authority of the United States pleading for the review of a conviction which has been affirmed.

We believe that the government's presentation to Your Honors suffices in itself to show not only the injustice of petitioner's conviction, but the very real threat posed by that conviction to the future administration of criminal law.

We pray that Your Honors will deem this case worthy of review, and will characterize the procedures followed below by appropriate comment.

Respectfully submitted,

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